

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
EASTERN DIVISION

FILED BY \_\_\_\_\_ D.C.  
05 AUG 17 AM 9:14  
THOMAS H. GOULD  
CLERK, U.S. DISTRICT COURT  
W.D. OF TENNESSEE

UNITED STATES OF AMERICA, )

Plaintiff, )

VS. )

No. 04-10028-T

GARY LEE DELANEY, )

Defendant. )

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ORDER DENYING MOTION TO PROCEED *IN FORMA PAUPERIS* AS MOOT  
AND  
ORDER DENYING MOTION FOR PRODUCTION OF TRANSCRIPTS  
AND FEE/COST WAIVER

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On January 13, 2005, defendant Gary Lee Delaney was found guilty by a jury of possessing a firearm after having been convicted of a felony. Defendant was sentenced on April 8, 2005 to 240 months imprisonment, to be followed by five years of supervised release. Judgment was entered on April 15, 2005. A notice of appeal was filed on April 13, 2005, and the appeal is currently pending before the United States Court of Appeals for the Sixth Circuit. United States v. Delaney, No. 05-5687 (docketed May 12, 2005). On August 15, 2005, the defendant, acting *pro se*, filed a "Motion for Production of Transcripts and Fee/Cost Waiver" along with a motion to proceed *in forma pauperis* and an inmate trust fund account statement. The defendant is presently represented by appointed counsel in this criminal matter and there are no other proceedings pending at this time. Therefore, the motion to proceed *in forma pauperis* is DENIED as moot.

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In his motion for production of transcripts, the defendant asks that he be provided with transcripts of his trial and sentencing hearing at government expense. Defendant states that he seeks to present a habeas corpus claim<sup>1</sup> of ineffective assistance of counsel.

If an indigent criminal defendant seeks a free transcript to use in preparing a motion under 28 U.S.C. § 2255, he may obtain one only “if the trial judge or a circuit judge certifies that the suit . . . is not frivolous and that the transcript is needed to decide the issue presented by the suit.” 28 U.S.C. § 753(f). In order for the Court to decide if the suit is not frivolous, a defendant must make a particularized showing of need for the transcript to justify providing the transcript at government expense. United States v. MacCollom, 426 U.S. 317, 326 (1976).

Although the Court has the authority to order transcripts provided at government expense under § 753(f), federal prisoners are not entitled to such transcripts for the purpose of preparing a motion under § 2255 if there is no § 2255 motion pending. Corrigan v. Thoms, 55 Fed. Appx. 754, 756 (6<sup>th</sup> Cir. Feb. 12, 2003); United States v. Lewis, 605 F.2d 379, 380 (8<sup>th</sup> Cir. 1979). Furthermore, the government need not finance a defendant’s “fishing expedition” to search for post-conviction claims. Corrigan, 55 Fed. Appx. at 756; United States v. Wilson, 49 Fed. Appx. 612, 613 (6<sup>th</sup> Cir. Nov. 1, 2002); see also Campbell v. United States, 538 F.2d 692, 693 (5<sup>th</sup> Cir. 1976) (“A federal prisoner is not entitled to obtain copies of Court records at the Government’s expense to search for possible defects merely because he is indigent.”); Bentley v. United States, 431 F.2d 250, 252 (6<sup>th</sup> Cir. 1970) (defendant not entitled to free transcript to search for grounds to file a motion under § 2255).

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<sup>1</sup> Prisoners challenging a federal conviction and/or sentence generally must file a motion under 28 U.S.C. § 2255 rather than a petition for writ of habeas corpus.

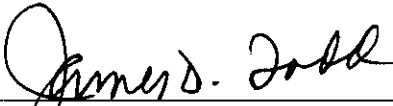

“If the Court is not given the benefit of some definite allegation as to the nature of the alleged illegal aspects of the judgment and sentence, it is but natural to surmise that this is a fishing expedition and that the present vague allegation of illegality is not made in good faith.”

Culbert v. United States, 325 F.2d 920, 922 (8<sup>th</sup> Cir. 1964) (quoting United States v. Lawler, 172 F. Supp. 602, 605 (S.D. Tex. 1959)). See also United States v. Fleming, No. 98-5246, 1999 WL 107956, \*2 (6<sup>th</sup> Cir. Feb. 9, 1999). Conclusory allegations of ineffective assistance of counsel such as those asserted in defendant’s motion for production of transcripts ordinarily are insufficient to justify a free transcript. MacCollom, 426 U.S. at 327.

In addition, in Capaldi v. Pontesso, 135 F.3d 1122, 1124 (6<sup>th</sup> Cir. 1998), the Sixth Circuit adopted the rule “that in the absence of extraordinary circumstances, a district court is precluded from considering a § 2255 application for relief during the pendency of the applicant’s direct appeal.” Therefore, if the defendant were to file a § 2255 motion before the conclusion of his direct appeal, it would be dismissed without prejudice as premature.

For these reasons, the defendant’s motion for production of transcripts is DENIED.

IT IS SO ORDERED.

  
\_\_\_\_\_  
JAMES D. TODD  
UNITED STATES DISTRICT JUDGE  
  
\_\_\_\_\_  
DATE



## Notice of Distribution

This notice confirms a copy of the document docketed as number 75 in case 1:04-CR-10028 was distributed by fax, mail, or direct printing on August 17, 2005 to the parties listed.

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Honorable James Todd  
US DISTRICT COURT